In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1500

PIKES PEAK BROADCASTING COMPANY, ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION AND
THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A 1–25) are not yet reported. The memorandum opinion and order of the Commission (J.A. 200–235—200–261) [1] is reported at 12 F.C.C. 2d 955.

JURISDICTION

The judgment of the court of appeals affirming the decision of the Commission was entered on March 24, 1969. A petition for rehearing was denied on May 2,

[1] "J.A." refers to the joint appendix in the court below, which has been certified to this Court.

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1969. The petition for a writ of certiorari was filed on June 9, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission properly declined to hold an evidentiary hearing to consider further the imposition of special restrictions on a CATV system which proposed to operate in Colorado Springs, Colorado.

REGULATIONS INVOLVED

The pertinent provisions of the regulations of the Federal Communications Commission—47 C.F.R. 74.1105, 74.1107 and 74.1109—are set forth in Appendix C to the petition.

STATEMENT

In August 1967, Vumore Video Corporation of Colorado, Inc., ("Vumore") gave notice pursuant to the Commission's CATV regulations (47 C.F.R. 74.1105) of its intention to operate a CATV system in Colorado Springs to carry to subscribers local and Denver television station and FM station signals. Petitioners, the licensees of television stations in the Colorado Springs area, requested the Commission to conduct an evidentiary hearing directed toward imposing upon Vumore "additional or different requirements" (47 C.F.R. 74.1109(a)) than those already provided in the Commission's general rules governing CATV systems in other than the top 100 television markets. Petitioners alleged that there was a potential for UHF development in Colorado Springs which would be endan-

gered by the presence of CATV, and further that CATV would threaten the economic health of existing television stations in that vicinity. They also alleged that Vumore's proposal raised an issue with respect to multiple and cross-ownership of CATV systems.

Under the Commission's CATV regulations, where a CATV system is proposed in a major market (the top 100) an evidentiary hearing is mandatory prior to operation of the system (47 C.F.R. 74.1107), unless expressly waived by the Commission on appropriate petition (47 C.F.R. 74.1109). In a small market (other than the top 100), a system may begin operation after notice has been given to local stations, without an evidentiary hearing. The Commission may, however, determine on its own motion or on petition of a potentially affected television station that operation of a CATV system in a small market would be inconsistent with the public interest (47 C.F.R. 74.1107(c)). Such a determination may be made on the pleadings or after such other proceedings, including oral argument, evidentiary hearings or further written submissions, as appear appropriate to the Commission. These differences in approach are based on the Commission's assessment of the differing economic effects to be expected from the operation of CATV systems in major and in small markets. See *Second Report and Order*, 2 F.C.C. 2d 725; *United States* v. *Southwestern Cable Co.*, 392 U.S. 157; Pet. App. A 5–7.

Applying these criteria, the Commission reviewed each of petitioners' contentions, but determined that, even if established, they would not present a situation differing from that contemplated for small markets in

the Commission's *Second Report and Order* adopting the regulations. It concluded, therefore, that the special relief sought by petitioners was not warranted, and accordingly, denied their request for a hearing. It also denied petitioners' request to designate the issue of multiple and cross-ownership for hearing, since that issue is the subject of a pending rule-making proceeding.[2]

On petition for review, the court of appeals (one judge concurring in part and dissenting in part) held that the Commission's decision denying special relief was "supported by the record and should be affirmed" (Pet. App. A3). It noted that petitioners proffered only predictions that UHF would develop in Colorado Springs absent CATV, stated that these predictions in turn rested only on "speculative contingencies," and concluded that the Commission "did not act unreasonably in rejecting [them] as inadequate" (Pet. App. A9). As to petitioners' assertion that the entry of CATV would threaten the economic viability of existing VHF stations in the relevant market, the court noted errors of fact and calculation in petitioners' principal offering, a market study referred to as the Coe-Saunders Report (Pet. App. A 7–8, 10–12), and concluded that the Commission's rejection of petitioners' claims in this regard was "supported in the record and * * * not lacking in reasoned judgment" (Pet. App. A13). It agreed with the Commission that petitioners had failed to come forward with a "reasonably clear and substantiated estimate of losses" to support their request for a hearing (Pet. App. A12, n. 8), and that the agency was under no obligation to

[2] Notice of Inquiry in Docket No. 17,371, 7 F.C.C. 2d 853.

afford a hearing when the allegations, even if proved, would not support the relief requested (Pet. App. A 13).[3]

The court of appeals also rejected petitioners' contention that the issue of multiple and cross-ownership of CATV systems should have been designated for hearing in this proceeding, observing that the issue is presently pending before the Commission in a rule-making proceeding, and holding that the Commission "will be able to remedy undue concentration of control if it occurs in the interim by retroactive adjustments, provided they are reasonable" (Pet. App. A 16).

ARGUMENT

The only issue actually presented here is whether the Commission reasonably exercised its discretion in refusing to conduct an evidentiary hearing directed toward imposing special requirements, in addition to those already effective under its general rules,[4] on a new CATV system in a particular small market. The record on this issue has been thoroughly canvassed by the court below, and the instant petition presents no question of general importance warranting plenary review by this Court.

1. The court of appeals' extended analysis of petitioners' allegations clearly shows that on the record

[3] The court below noted, moreover, that the Commission's power to alleviate any impact of CATV in Colorado Springs which might be detrimental to the public interest did not cease with this case. Should future conditions call for extraordinary remedies to maintain healthy television broadcast service, those remedies will be available to petitioners (Pet. App. A 14–15).

[4] *E.g.*, the local carriage and non-duplication requirements (see Pet. App. A 5, 7, and n. 4).

before it the Commission was not required to hold a hearing before authorizing CATV service in Colorado Springs. Petitioners were seeking a departure from the general rules established for CATV authorizations in this particular instance. Before a hearing was necessary petitioners were required to demonstrate a valid basis for so proceeding. *United States* v. *Storer Broadcasting Corp.*, 351 U.S. 192, 205. Whether a sound basis for such a departure from the ordinary approach had been shown involved a matter peculiarly within the agency's discretion, subject of course to the requirement that the reasons for its decision be rationally explicated.

Petitioners assert that there is no clear standard for the showing necessary to obtain a hearing on a request for extraordinary relief under 47 C.F.R. 74.1109 regarding proposed CATV entry into a small market. However, the rule implements a viable substantive standard prescribed for determining whether special and additional requirements should be imposed—*i.e.*, a showing that the CATV system's extension of television signals "would be inconsistent with the public interest, taking into account particularly the establishment and healthy maintenance of television broadcast service in the area" (47 C.F.R. 74.1107(c); Pet. App. C 4). See also *Second Report and Order, supra*, 2 F.C.C. 2d at 783. After a comprehensive review of the record the court below found the Commission's denial of petitioners' request for a hearing reasonable because petitioners' allegations did not warrant the requested relief even assuming they could have been established at a hearing (Pet. App. A 17–18). In these circumstances, additional review by this Court is unnecessary. *Uni-*

versal Camera Corp. v. *National Labor Relations Board,* 340 U.S. 474, 490–491.[5]

Moreover, the Commission's authority to control CATV development detrimental to free off-the-air television service does not cease by reason of its decision not to impose special restrictions when service is initiated. Should future conditions call for extraordinary remedies to maintain healthy television broadcast service, they will be available, subject to due process considerations. But, as the court below observed, nothing in the record before the Commission and the court indicates a need for their imposition now (Pet. App. A 14–15).

2. The court of appeals properly upheld the Commission's refusal to designate the issue of multiple and cross-ownership of CATV systems for hearing in this proceeding. As the court noted, that matter is presently the subject of pending rule-making proceeding, an approach that is within the Commission's discretion to select as the appropriate one for its resolution. See *American Commercial Lines* v. *Louisville & Nashville R. Co.,* 392 U.S. 571, 590–593; *Federal Communications Commission* v. *Pottsville Broadcasting Company,* 309 U.S. 134. There was no showing that such

[5] In none of the cases relied on by petitioners were the Commission's standards of pleading, or the articulation of those standards, found to be inadequate. See *Channel 9 Syracuse, Inc.* v. *Federal Communications Commission*, 385 F. 2d 969 (C.A.D.C.); *Hubbard Broadcasting, Inc.* v. *Federal Communications Commission*, 385 F. 2d 979 (C.A.D.C.); and *Cedar Rapids Television Co.* v. *Federal Communications Commission*, 387 F. 2d 228 (C.A.D.C.). Moreover, all these cases, including the instant one, were decided by the District of Columbia Circuit. Thus, there is no conflict among circuits.

an issue was germane to conditions in the Colorado Springs television market, and in any event the results of the rule-making proceeding will be applicable to Vumore (Pet. App. A 15–16).[6]

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

RICHARD W. MCLAREN,
Assistant Attorney General.

HOWARD E. SHAPIRO,
GEORGE EDELSTEIN,
Attorneys.

HENRY GELLER,
General Counsel,

JOHN H. CONLIN,
Associate General Counsel,

D. BIARD MACGUINEAS,
Counsel,
Federal Communications Commission.

JUNE 1969.

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[6] Similarly without merit is petitioners' contention that certiorari should be granted so that the Commission's *proposed* rules governing CATV may be applied in this case. See Notice of Proposed Rule Making and Notice of Inquiry in Docket No. 18,397, 15 F.C.C. 2d 417 (December 13, 1968). The new rules are merely proposed, not in effect. The court below properly intimated "no opinion on whether or to what extent changes in the rules would affect the rights of the parties in further or different proceedings before the Commission" (Pet. App. A 17, n. 11). See also the Commission's Memorandum Opinion and Order ~~for~~ in Docket No. 18,397 (released May 16, 1969).

U.S. GOVERNMENT PRINTING OFFICE: 1969